STATE OF MICHIGAN

COURT OF APPEALS

SHARON MASTEN, as Guardian and Conservator of TIMOTHY MASTEN,

Plaintiff-Appellee-Cross-Appellant,

v

DOYLE B. ROBERTS AND KALEEL BROTHERS, INC.,

Defendants-Appellants-Cross-Appellees.

UNPUBLISHED
August 16, 2005

No. 255050
Wayne Circuit Court
LC No. 02-205385-NI

Before: Cooper, P.J., and Hood and R. S. Gribbs,* JJ.

PER CURIAM.

In this personal injury action, defendant Doyle B. Roberts appeals as of right the jury verdict for plaintiff Timothy Masten. Plaintiff Timothy Masten's vehicle collided with a tractor trailer driven by defendant Doyle B. Roberts (defendant) in the course of his employment by defendant Kaleel Brothers, Inc. The collision occurred in an intersection. Accident reconstruction experts differed regarding fault, and medical experts differed regarding the extent of plaintiff's injuries. The jury found that defendant was negligent, and that plaintiff suffered a post traumatic stress disorder, non-displaced fractures and a separated shoulder as a result of defendant's negligence. The jury also found that plaintiff did not have a mild traumatic brain injury and that, although he had Peyronie's disease, it had not been caused by the accident. The jury also found that plaintiff was 45% comparatively negligent. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

On appeal, defendants argue that the trial court erred when it refused to add the comment section of SJI2d 12.02 to the jury instruction. The trial court gave the requested instructions from Standard Jury Instructions [SJI2d] 12.01 and 12.02 verbatim, but did not read the "comment" section from SJI2d as part of the instructions. Defendants wanted the trial court to read the jury portions of the comment from SJI2d 12.02, which relates the five categories of excused violations found in 2 Restatement Torts, 2nd, § 288 A, pp 32-33, one of which is "an emergency not due to his own misconduct." Defendants presents no authority regarding a trial court's decision whether to read the commentary section to a jury instruction. Moreover, as the

* Former Court of Appeals Judge, sitting on the Court of Appeals by assignment.

trial court said, the evidence did not support a special instruction on emergency. Indeed, defendant Roberts was specifically asked on more than one occasion whether the SUV entering his lane created an emergency situation – defendant replied that the SUV entering his lane was not an emergency, that he had no trouble moving his truck over to the other lane, and that he did not slam on his brakes, take evasive action, or swerve off the road. He was able to safely change lanes. He simply did not believe that he could stop safely for the changing light. Although defendant's characterization as "emergency" was neither supported by the evidence or detailed in the jury instruction, defendant's claim that he could not safely stop at the yellow light, and an instruction that the inability to safely stop was a defense, were before the jury. The jury was instructed that, if it believed that defense, it should find that any violation of the statute was excused. Defendants were not denied a fair trial because of an instructional error. *Ward v Consolidated Rail Corp,* 472 Mich 77, 83; 693 NW2d 366 (2005).

Defendants also argue that juror Cook should have been dismissed for cause. "A venireman is presumed to be qualified and the party challenging a venireman carries the burden of showing disqualification for cause." *Vandette v Toffolo,* 29 Mich App 185, 189; 185 NW2d 130 (1970). A party is entitled to nothing more than an impartial jury, "and when he has obtained that he has no valid ground for complaint." *Cocora v GMC,* 161 Mich App 92, 96; 409 NW2d 736 (1987). Here, juror Cook denied any bias and said she could be a fair juror. There was nothing in the record to indicate that juror Cook's opinion about expert witnesses would prevent her from rendering a fair verdict, there was no evidence that juror Cook had ever been an adverse party to either defendants or their law firm, and there was no evidence that juror Cook had any financial interest in the outcome of the case, or that she was interested in "a like issue." Defendants did not ask any questions or develop a record to the contrary during voir dire. "This Court defers to the trial court's superior ability to assess from a venireman's demeanor whether the person would be impartial." *People v Williams,* 241 Mich App 519, 522; 616 NW2d 710 (2000). Defendants were entitled to a fair and impartial jury and there is no indication on the record that juror Cook was not fair and impartial. *Cocora, supra*, 161 Mich App 96.

Next, defendants contend that the trial court improperly admitted testimony regarding plaintiff's recent, undisclosed, visit with Dr. Sewick, as well as plaintiff's most recent test reports. The admission of evidence is reviewed for an abuse of discretion. *Department of Transportation v VanElslander,* 460 Mich 127, 129; 594 NW2d 841 (1999). Defendants have waived this issue. The trial court provided defendants with a copy of the recent records and told counsel that "if you think that there's something that you missed in cross-examination . . . we'll have Dr. Sewick come back and testify." Defense counsel responded, "That's appropriate, Your Honor." "A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Hilgendorf v St. John Hosp,* 245 Mich App 670, 683; 630 NW2d 356 (2001), quoting *Dresselhouse v Chrysler,* 177 Mich App 470, 477; 442 NW2d 705 (1989). We find no abuse of discretion.

Defendants argue that the trial judge erred by refusing to reduce the judgment by collateral sources of recovery, such as social security benefits. MCL 600.6303. There is no merit to this claim. Plaintiff's expert testified that he deducted past and future social security payments and no-fault benefits when he determined plaintiff's lost wages to be $531,389. His testimony was not challenged or rebutted by defendants. The jury awarded future wage loss

benefits of approximately $250,000. Before entry of the judgment, defendants challenged the award and asked for a reduction for collateral sources. As the trial court stated below, if defendants did not want plaintiff's expert to testify to a figure that had already been reduced by collateral sources they should have said so at trial and, since they did not do so, defendants waived any challenge on this issue. The trial court did not err in refusing to reduce the damage award a second time.

Defendants argue, for the first time on appeal, that jury instructions SJI2d 11.01 and 66.03 should not have been given. Defendant's argue that it is prejudicial to defendants for the jury to know that a damage award will be reduced by the percentage of a plaintiff's negligence and that, if the plaintiff is more than 50% at fault, he is not entitled to noneconomic damages. Model civil jury instructions, adopted by the Committee on Model civil Jury Instructions that was appointed by our Supreme Court, are authorized by court rule. MCR 2.516(D). We find no plain error affecting defendants' rights in this case. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999).

Plaintiff argues on cross-appeal, through his guardian, that the trial court erred in denying him a judgment notwithstanding the verdict because he did not run through a red light, and there is no basis for the jury's finding that he was partly at fault. The appellate court reviews de novo "the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000); *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). We find no abuse of discretion here. Although it appears that plaintiff had the right of way by virtue of the green light, there was evidence that plaintiff "rolled" through the light as it changed and could have stopped or slowed down to avoid the collision – indeed, the other southbound car that stopped for the red light had not even started to enter the intersection when the collision occurred. Plaintiff said he did not see the truck until he hit its rear axle. On these facts, the jury could have concluded that plaintiff was 45 percent negligent for failing to see defendants' 70 foot, 50,000 pound truck before he entered the intersection.

Plaintiff also argues that the verdict was against the great weight of the evidence. A new trial may be granted on some or all issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). However the trial court must not substitute its judgment for that of the factfinder, and the jury verdict should not be set aside if there is competent evidence to support it. *Ellsworth v Hotel Corp*, 236 Mich App 185, 194; 600 NW2d 129 (1999). The jury and trial court are accorded substantial deference because both were in a better position to determine credibility and weight the testimony. *Id*. For the same reasons presented in the previous issue – that plaintiff did not stop at the intersection but rather "rolled" through without noticing defendants' 70 foot truck - there was competent evidence to support the jury verdict.

Finally, plaintiff contends that the trial court erred in reducing the entire judgment, including the award of costs, by the percentage of plaintiff's fault. We agree. MCR 2.403(1) entitles a party to mediation costs if "the verdict is more favorable to that party than the case evaluation." For purposes of the court rule, "verdict" is narrowly defined and, in this case, can refer only to the jury verdict. MCR 2.403(2). *Jerico Construction v Quadrants, Inc*, 257 Mich App 22, 31; 666 NW2d 310 (2003). The "underlying purpose of mediation" is "to encourage

settlement and deter protracted litigation by placing the burden of litigation costs upon the party that required that the case proceed toward trial by rejecting the mediator's evaluation." *Id.*, 257 Mich App 32, quoting *Broadway Coney Island, Inc v Commercial Union Ins Cos,* 217 Mich App 109, 114; 550 NW2d 838 (1996). Comparative fault, on the other hand, is applied to "reduce the damages" in a personal injury action. MCL 600.2959. Comparative fault does not affect the costs of litigation or the purposes of awarding mediation sanctions. The prevailing party is entitled to the full amount of mediation sanctions. The trial court erred in reducing the award of costs in this case by the percentage of plaintiff's comparative fault.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs